

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 2092

SPONSOR: Judiciary Committee and Senators Villalobos and Smith

SUBJECT: Elderly Persons

DATE: March 25, 2004

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Lang</u>	<u>JU</u>	<u>Fav/CS</u>
2.	<u>Parham</u>	<u>Wilson</u>	<u>HC</u>	<u>Fav/2 amendments</u>
3.	_____	_____	<u>BI</u>	_____
4.	_____	_____	<u>ACJ</u>	_____
5.	_____	_____	<u>AP</u>	_____
6.	_____	_____	_____	_____

I. Summary:

This bill creates the Financial Protection for the Elderly Act. The bill provides protection to elderly persons over 60 years of age against financial exploitation of money, funds, assets or property, by entitling elderly persons, or certain other persons acting on their behalf, to a cause of action for financial exploitation by a financial institution and to recover certain civil damages, including punitive damages capped at \$1 million. The bill requires the court to consider specific circumstances when determining an act is unconscionable, and therefore constituting financial exploitation.

The bill authorizes the Attorney General to investigate and file civil actions in cases of financial exploitation against an elderly person. Funding for the Elder Victims Trust Fund includes one-half of all punitive damages awarded and moneys received by the Attorney General for attorney's fees and costs of investigation or litigation under this authority.¹

The bill requires the Department of Elderly Affairs to create statewide initiatives to educate the public, including the elderly, law enforcement, judiciary, and social service professionals of deceptive and unfair acts against the elderly.

The bill creates ss. 410.701, 410.702, 410.703, 410.704, and 410.705, Florida Statutes.

The bill creates one undesignated section of law.

¹ See SB 2090

II. Present Situation:

Elder Abuse, Neglect, and Exploitation

Federal definitions of elder abuse, neglect, and exploitation appeared for the first time in the 1987 Amendments to the Older Americans Act. These definitions were provided in the law only as guidelines for identifying the problems, and not for enforcement purposes. Currently, elder abuse is defined by state laws, and state definitions vary considerably from one jurisdiction to another in terms of what constitutes the abuse, neglect, or exploitation of the elderly. Broadly defined, however, there are three basic categories of elder abuse: (1) domestic elder abuse; (2) institutional elder abuse; and (3) self-neglect or self-abuse.² In most cases, state statutes addressing elder abuse provide the definitions of these different categories of elder abuse, with varying degrees of specificity. Domestic and institutional elder abuse may be further categorized as follows:

- *Physical abuse* is defined as the use of physical force that may result in bodily injury, physical pain, or impairment.
- *Sexual abuse* is defined as non-consensual sexual contact of any kind with an elderly or disabled person or with any person incapable of giving consent.
- *Emotional or psychological abuse* is defined as the infliction of anguish, pain, or distress through verbal or nonverbal acts. Emotional/psychological abuse includes but is not limited to verbal assaults, insults, threats, intimidation, humiliation, and harassment.
- *Neglect* is defined as the refusal or failure to fulfill any part of a person's obligations or duties to an elder. Neglect may also include failure of a person who has fiduciary responsibilities to provide care for an elder (e.g., pay for necessary home care services) or the failure on the part of an in-home service provider to provide necessary care.
- *Exploitation* is defined as misusing the resources of an elderly or disabled person for personal or monetary benefit. This includes taking Social Security or SSI (Supplemental Security Income) checks, abusing a joint checking account, and taking property and other resources.

The National Center on Elder Abuse (NCEA) is the major source of available statistics on elder abuse, neglect, and exploitation in the U.S. NCEA collects and analyzes national data on cases referred to and investigated by adult protective services, and serves as a resource to investigators worldwide. The 1998 National Elder Abuse Incidence Study³ ranked, in order of frequency, the types of elder mistreatment:

- Neglect;
- Emotional/Psychological Abuse;
- Physical Abuse;
- Financial/Material Exploitation; and
- Abandonment.

² National Center on Elder Abuse. 2004. <http://www.elderabusecenter.org/>.

³ National Center on Elder Abuse. September 1998. *National Elder Abuse Incidence Study: Final Report*. Washington, DC: U.S. Department of Health and Human Services, Administration for Children and Families and Administration on Aging.

Florida's Adult Protective Services Program

The Department of Children and Family Services, (DCF) Adult Protective Services (APS) program, mandated by chapter 415, F.S., is a system of specialized social services directed toward protecting vulnerable adults who are unable to manage their own affairs, from further occurrences of abuse, neglect, or exploitation. Assessment of an individual's need for protective services is initiated in response to a reported allegation of abuse, neglect, or exploitation. The four components of APS are:

- The on-site investigation of all reports of alleged abuse, neglect, or exploitation;
- Determination of immediate risk to the vulnerable adult and the provision of necessary emergency services;
- Evaluation of the need for and provision of on-going protective supervision; and
- Provision or arrangement of on-going protective services.

The central APS program office in Tallahassee is responsible for administrative and policy development functions such as planning, budgeting, quality assurance, and ensuring the integrity of program data. DCF also administers the Florida Abuse Hotline in Tallahassee to receive reports alleging abuse, neglect, or exploitation of any vulnerable adult. Program services are provided locally through the department's 15 service district offices district staff conduct adult protective investigations and provide case management and referral services for adult abuse victims. Adult protective services include the functions listed below.

Adult protective investigations are conducted for all abuse reports. These investigations determine whether there is evidence that abuse, neglect, or exploitation occurred; whether there is an immediate and long-term risk to the victim; and whether the victim needs additional services to safeguard his or her well-being.

Case management is provided to clients who need additional services in order to be protected from further harm. Case management may be intensive, involving frequent contact with the victim and typically lasts for three to six months. Case management may involve removing victims from an unsafe environment and relocating them to a setting where their needs can be safely and suitably met, such as a nursing home or an assisted living facility.

Referral services are provided to some clients to help ensure that they are not victimized again in the future.

DCF collects statistical data on complaints of exploitation which are reported annually. The DCF database tracks complaints for "maltreatments of exploitation." However, the database does not currently collect information specific to financial exploitation. The total number of complaints received by DCF related to "maltreatments of exploitation" requiring investigation in fiscal year 2002-2003 was 9,230. The chart below reports the numbers by each exploitation category.

Type of Exploitation	Verified	Some Indication	No Indication
Obtains or uses by Deception/Intimidation	618	1142	4532
Endeavors to obtain or use by Deception/Intimidation	79	177	910
When Victim Lacks Capacity	218	284	1194

Source: DCF, March 26, 2004.

Protection Against Elder Abuse and Neglect

Various Florida statutes provide protection to elderly persons against abuse, neglect, and exploitation. Chapter 825, F.S., specifically governs the abuse, neglect, and exploitation of elderly persons and disabled adults. Section 825.103, F.S., defines exploitation as:

- Knowingly, by deception or intimidation, obtaining or using, or endeavoring to obtain or use, an elderly person’s...funds, assets, or property with the intent to temporarily or permanently deprive the elderly person...of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person or disabled adult, by a person who:
 - Stands in a position of trust and confidence with the elderly person or disabled adult; or
 - Has a business relationship with the elderly person or disabled adult.
- Obtaining or using...an elderly person’s...funds, assets, or property with the intent to...deprive the elderly person...of the use, benefit, or possession of the funds, assets, or property...by a person who knows or reasonably should know that the elderly person...lacks the capacity to consent.

Chapter 825, F.S., provides for the charge of a first degree felony for exploitation of an elderly person where the funds, assets, or property are valued at \$100,000 or more, for a second degree felony where funds are valued at between \$20,000 and less than \$100,000, and for a third degree felony where funds are valued at less than \$20,000.⁴ Ignorance of a person’s age is not a defense.⁵

Chapter 772, F.S., is the Civil Remedies for Criminal Practices Act. This Act creates a civil cause of action for violations of certain enumerated crimes, such as for usurious practices, violations of the secure transactions act, unlawful telemarketing activities, illegal insurance transactions, and credit card crimes.⁶ Although punitive damages are not authorized under this section, a person who proves injury by clear and convincing evidence may recover up to three times actual damages caused.⁷

⁴ s. 825.103(2), F.S.

⁵ s. 825.104, F.S.

⁶ s. 772.102, F.S.

⁷ s. 772.104, F.S.

While Florida's Anti-Fencing Act classifies an elderly person as one who is 65 years of age or older, the offense of exploitation committed against an elderly person refers to someone who is 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunction, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired.⁸

Chapter 415, F.S., relates to Adult Protective Services. Section 415.1111, F.S., authorizes the creation of a civil cause of action and the recovery of actual and punitive damages for abuse, neglect, or exploitation against vulnerable adults. A vulnerable adult is defined as someone who is 18 years old or older, and whose ability to perform normal activities is impaired because of a mental, emotional, long-term physical or developmental disability or dysfunctioning, brain damage or the infirmities of aging.⁹

Section 415.102(7), F.S., defines "exploitation" to mean a person who:

- Stands in a position of trust and confidence with a vulnerable adult and knowingly, by deception or intimidation, obtains or uses, or endeavors to obtain or use, a vulnerable adult's funds, assets, or property with the intent to temporarily or permanently deprive a vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult; or
- Knows or should know that the vulnerable adult lacks the capacity to consent, and obtains or uses, or endeavors to obtain or use, the vulnerable adult's funds, assets, or property with the intent to temporarily or permanently deprive the vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult.

"Exploitation" may include, but is not limited to:

- Breaches of fiduciary relationships, such as the misuse of a power of attorney or the abuse of guardianship duties, resulting in the unauthorized appropriation, sale, or transfer of property;
- Unauthorized taking of personal assets;
- Misappropriation, misuse, or transfer of moneys belonging to a vulnerable adult from a personal or joint account; or
- Intentional or negligent failure to effectively use a vulnerable adult's income and assets for the necessities required for that person's support and maintenance.

III. Effect of Proposed Changes:

Section 1. Creates the Financial Protection for the Elderly Act.

⁸ See chapter 812, F.S. and s. 825.101(5), F.S.

⁹ In 2000, the terms "elderly persons and disabled adult" were uniformly replaced with the term "vulnerable adult" in chapter 415, F.S. See s. 415.102(26), F.S.

Section 2. Creates s. 401.701, F.S., providing legislative intent. This section specifies that the Legislature recognizes that elderly persons are frequent victims of deceptive and unfair acts and business practices and are often unusually vulnerable to these acts. It is also the intent of the Legislature that these provisions are to be construed liberally to provide for the protection of elderly persons, and to ensure recourse from financial exploitation.

Section 3. Creates s. 401.702, F.S., to provide definitions specific to this act including the terms deception, department, elderly person, financial institution, financial exploitation, intimidation, obtains or uses, and unconscionable. An elderly person over 60 years of age is provided protection under this act, without regard to infirmity. Financial exploitation occurs when one obtains or uses, or endeavors to use, an elderly person's money, funds, assets or property through deception, intimidation, unfair or unconscionable acts, including aiding or abetting these acts. This bill requires the court to consider specific circumstances when determining whether an act is unconscionable, including:

- The defendant took advantage of an elderly person's inability to protect his or her interests because of mental or physical infirmity, ignorance, or illiteracy;
- The elderly person was unable to materially benefit from the transaction;
- The defendant knew or should have known that there was no reasonable probability that the elderly person could pay a financial obligation;
- The defendant induced the elderly person into the transaction to the person's detriment;
- The act or practice of the defendant shocks the conscience or offends public policy; or
- The defendant seeks a waiver of the rights and remedies under this bill.

Section 4. Creates s. 410.73, F.S., relating to civil actions against financial exploitation. This section declares financial exploitation of an elderly person by a financial institution unlawful and against state policy. This section provides for a cause of action in a circuit court for an elderly person to obtain a declaratory judgment, or to enjoin a violator of the provisions of this section.

This section provides that if an elderly person suffers injury or loss as a result of a violation of this section, he or she may bring an action for damages, including punitive damages. Prevailing plaintiffs may recover reasonable attorney's fees and costs.

This section specifies that a guardian, family member, person, or organization acting on behalf of the elderly person with certain consent, or the personal representative, executor, or trustee is granted standing to sue if an elderly person is deceased, and that if the person dies, this does not cause the court to lose jurisdiction of any claim for relief under this section.

An elderly person is authorized to move the court to advance the trial on the docket, and the presiding judge may advance the trial. The motion may be served with the civil complaint or at any point thereafter.

This section provides that the Attorney General is authorized to investigate, administer oaths, and subpoena witnesses, and to bring a civil action in circuit court to obtain a declaratory judgment or enjoin a violator, or for actual damages or restitution on behalf of an elderly person. Costs and fees will be awarded in prevailing cases to the Attorney General, to be deposited in the Elder Victims Trust Fund.

Section 5. Creates s. 410.704, F.S., relating to limitations on punitive damages. An award of punitive damages under this section may not exceed \$1 million. This section does not prohibit a court from exercising caution in determining the adequacy of an award of punitive damages which is less than three times the amount of compensatory damages, apart from subsection (1). The jury may not be told of the provisions of this section.

Despite any law to the contrary, the punitive damages awarded under this section are to be divided equally between the claimant and the Elder Victims Trust Fund as follows:

- The clerk of the court is required to transmit a copy of any verdict and final judgment providing for punitive damages under this section to the Chief Financial Officer by certified mail. The court is required to order the percentages of the punitive damages award, payable in equal divisions between the claimant and the Elder Victims Trust Fund.
- If a settlement agreement is entered into between the parties to the action after a jury verdict awarding punitive damages in an action brought under this section has been returned, the parties must provide for an equal share of the punitive damages payable to the Elder Victims Trust Fund and the claimant.
- The Department of Revenue is required to collect all punitive damages payable to the Elder Victims Trust Fund. Punitive damages are to be deposited in the Elder Victims Trust Fund. If the full amount of punitive damages cannot be collected, the claimant and the other recipients are each entitled to equal shares of the punitive damages collected.

Section 6. Creates s. 410.705, F.S., requiring the Department of Elder Affairs to create statewide initiatives to educate the public, including the elderly, law enforcement, judiciary, and social service professionals of deceptive and unfair acts against the elderly. These groups must be informed of the provisions of this chapter, and other statutory provisions related to elder exploitation, and of the rights and remedies available to elderly individuals.

This section clarifies that these rights and remedies supplement those already in existence, except that punitive damages are recoverable only under this legislation or alternatively under chapter 772, F.S.

This section provides that lack of knowledge of an elderly person's age is not a defense. Any waiver by an elderly person of these rights is unenforceable and void. This section also provides protection to an elderly person without requiring that he or she is infirm or otherwise lacks capacity.

Section 7. Provides that this act shall take effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Article I, s. 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The elder victims trust fund may be created with the passage of SB 2090 by a three-fifths vote of the members of both houses of the Legislature.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The bill could provide an additional avenue to elderly persons for recovery of damages in financial exploitation actions.

Financial institutions that engage in financial exploitation will have specific punitive actions taken against them.

C. Government Sector Impact:

The bill requires the Department of Elderly Affairs to create statewide initiatives to educate the public, including the elderly, law enforcement, judiciary, and social service professionals of deceptive and unfair acts against the elderly. The bill does not clearly specify that the Elder Victims Trust Fund created in SB 2090 will be used to fund these initiatives and there is no way to estimate the amount of funds that will be deposited in the Elder Victims Trust Fund to be appropriated to the department for implementing the initiatives.

The new civil causes of action proposed under this bill should result in additional revenue generating to the state, due to an increase in filing fees. Under chapter 2003-402, L.O.F., filing fee revenue is directed to the General Revenue Fund, the Clerk of Courts Operations Conference, the Court Education Trust Fund, and the Clerks of Court Trust Fund, effective July 1, 2004.

The bill also provides that half of punitive damage awards, as well as litigation costs and attorney's fee awards received by the Attorney General, shall be deposited into the Elder Victims Trust Fund.

Given the state's large elderly population, this bill potentially has a notable fiscal impact on judicial workload, particularly related to expedited circuit proceedings. This bill may increase due process costs for the state. Under chapter 2003-402, L.O.F., certain due process services that are being transferred from the counties to the state include costs for

conflict counsel, court reporting, interpreting, auxiliary aids or services, and expert witness fees.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Section 4 of the bill specifies that a guardian, family member, person, or organization acting on behalf of the elderly person with certain consent, or the personal representative, executor, or trustee is granted standing to sue if an elderly person is deceased. It is uncertain who will have priority standing to sue in the event of an elderly person's death.

VIII. Amendments:

#1 by Health, Aging, and Long-Term Care:

Deletes the word "unconscionable" from the definitions section of the bill.

#2 by Health, Aging, and Long-Term Care:

Clarifies that funds from the Elder Victims Trust Fund can be used to pay for the education initiatives that the Department of Elder Affairs must implement under the bill.